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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

_____Term.

No._____.

HORACE LEE BARTINDALE,

Petitioner.

Vs

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Horace Lee Bartindale, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The above named, Horace Lee Bartindale, the petitioner herein, prays for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, the court of last resort of that State, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department, which affirmed a judgment of conviction and sentence to imprisonment of the petitioner for a term, the minimum of which is not less than five years and the maximum, not more than ten years; and affirmed an order denying the motion of the petitioner for an order, vacating and setting aside the judgment of conviction; permitting the withdrawal of the plea of guilty to the indictment and substituting and reinstating the plea of not guilty and for a new trial. The petitioner was convicted by his plea of guilty in the County Court of the County of Rockland on the 2nd day of October, 1940. The order and judgment of the Court of Appeals of the State of New York were made the judgment of the County Court by the filing of the remittitur of said Court with the Clerk of the County Court, Rockland County, on the 18th day of November, 1940.

I.

The petitioner applies for certiorari upon the first ground that his plea of guilty to the indictment was brought about by the deceit, fraud and trickery of the district attorney and petitioner's counsel. That such acts rendered the plea involuntary in that had such acts not have been practised upon him, petitioner would not have been deprived of a trial on the merits.

The petitioner was indicted on or about the 27th day of June, 1939 by the Grand Jury of Rockland County, and charged with a violation of Section 690 of the Penal Law.(1) This indictment accused the petitioner of the commission of the crime of sodomy upon the person of one John Beckvermit Jr. On the 10th day of July, 1939, the petitioner, through his former counsel, pleaded not guilty to the indictment in the Rockland County Court before Hon. John A. Mckenna (fol[illegible]).

The trial of the petitioner was then set for July 17th, 1939 and because of the illness of Mr. Dorsey, the district attorney, was adjourned to September27th, 1939 (fol[illegible]). Subsequently petitioner retained as his attorney, William Pickens, Esq., and on October 2, 1939, the case came on for trial (fol[illegible]).

The petitioner's attorney and the district attorney completed the selection of the jury, when at or about 10:55 A.M. the Court declared a short recess (fol[illegible]). Mr. Pickens then left the courtroom with Mr. Dorsey, the district attorney, and they spoke together for about ten minutes (fol[illegible]). Mr. Pickens then returned and spoke with petitioner. He was advised that Mr. Pickens had spoken with the district attorney. The substance of the conversation between Mr. Pickens and Mr. Dorsey was that Mr. Dorsey told petitioner's counsel, that if petitioner were found guilty he would "be given the limit" which meant twenty years imprisonment. Mr. Pickens told petitioner that since petitioner was a colored person, and in view of the notoriety and publicity given the case, that he had been prejudged by the public and hence a verdict of guilty was inevitable. The petitioner was told by Mr. Pickens that Mr. Dorsey, the district attorney, had represented and promised to him that if petitioner would plead guilty, as a first offender, he would receive a suspended sentence. Petitioner, as a result of this expres-

ed promise and representation of the district attorney, that he would receive a suspended sentence, consented to a withdrawal of his plea of not guilty and substituted a plea of guilty to the indictment. (Fols. [illegible]).

Thereafter, on the 4th day of October, 1939, the petitioner was sentenced by the County Court, to an indeterminate sentence of not less than five years nor more than ten years in Sing Sing Prison (Fol.). Petitioner, because of the representation and promise made to his attorney by the district attorney that he would receive a suspended sentence if he pleaded guilty, took this sentence with great shock and surprise. He had always maintained his innocence and was at all times reluctant to withdraw his plea of not guilty.

Petitioner, immediately thereafter retained other counsel and moved the County Court for an order vacating and setting aside the judgment of conviction, withdrawing the plea of guilty and reinstating the plea of not guilty and for a new trial. Petitioner's contention is that under the circumstances, his plea of guilty was an involuntary one. It was brought about solely by the fraud, deceit and trickery of the district attorney and petitioner's counsel. That the circumstances were such that petitioner's free will and judgment was overreached to such an extent that he was deprived of the right to a trial on the merits.

The motion subsequently made to withdraw this plea was opposed on the ground that the County Court had no jurisdiction or power to allow the plea to be withdrawn under the decisions of the Court of Appeals construing Section 337 of the Code of Criminal Procedure. This Section is discussed at pages 4-6 of the brief in support of this petition.

That the action of the district attorney and petitioner's counsel effected a denial of petitioner's rights guaranteed under the Fourteenth Amendment to the Constitution of the United States was raised in the lower courts and was asserted and preserved by the petitioner in his appeal to the Court of Appeals of the State of New York.

II.

Petitioner's second ground for this application for certiorari rests upon the proposition that the proceedings had in this case and the action inducing the withdrawal of the plea of not guilty by the petitioner was in effect a flagrant denial of petitioner's right to counsel.

Petitioner had at all times steadfastly maintained his innocence even at the time when he was told by his counsel of the expressed representation and promise by the district attorney that if petitioner pleaded guilty he would receive a suspended sentence. The effect of such promise and representation to petitioner's counsel denied to petitioner the right to appear and defend in person and with counsel as a party accused. Petitioner's right to counsel implies the right to the advice of counsel uninfluenced by false and untrue representations.

Therefore, the action by the State by its agent was contrary to the fundamental principles of liberty and justice, and that the whole proceeding was a wrong so fundamental that it rendered the conviction and sentence of the petitioner wholly void under the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

III.

The petitioner's third main ground for this application for certiorari rests further upon the proposition that the action of the County Court, in summarily disposing of petitioner's contentions as to the circumstances concerning his plea of guilty without affording him the right and opportunity of proving them in open court, was in effect a denial of the opportunity to be heard, in violation of the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

Petitioner retained different counsel to make the motion to set aside the judgment of conviction, withdraw the plea of guilty and substitute and reinstate the plea of not guilty. This application was based upon the facts concerning which the plea was made. It was made upon the affidavit of the petitioner, verified under oath. This motion

was heard and decided by the County Court on the papers and on the argument of counsel alone. (R p 70). The issues created by the moving and opposing affidavits created a grave issue. A request was made by counsel to have the petitioner in open court so that a full and complete hearing might have been had to determine the truth of the allegations in the moving papers (R p 74). This request was denied in that the County Court should have set the motion down for a hearing so that petitioner might produce witnesses and be present himself to prove this grave issue involving his personal liberty.

This action deprived the petitioner of his right to liberty under the Fourteenth Amendment to the Constitution of the United States.

B.

Reasons Relied on for the Allowance of the Writ

I.

That the plea of guilty by the petitioner to the indictment was brought about by the deceit, fraud and trickery of the district attorney and petitioner's counsel thereby rendering such plea involuntary and void, in that had such acts not been practiced upon him, petitioner would not have been deprived of a trial on the merits. Hence the conviction and imprisonment of the petitioner (which judgment was affirmed by the court of last resort of this State) is void as having been rendered in contravention of the Fourteenth Amendment to the Constitution of the United States.

II.

That the effect of such action by the district attorney was in effect a flagrant denial of petitioner's right to counsel, hence a deprivation of petitioner's right to life and liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

III.

That the action of the County Court in summarily disposing of petitioner's contentions as to the circumstances concerning his plea of guilty without affording him the right to prove them in open court was in effect a denial of the opportunity to be heard in contravention of the Fourteenth Amendment to the Constitution of the United States.

Brief In Support of Petition For Writ of Certiorari

I.

Opinion of the Court Below

There was no opinion written by either of the Appellate Courts below. The judgment was unanimously affirmed by the Court of Appeals of the State of New York.

II.

Jurisdiction of This Court

A.

The statutory provision sustaining the jurisdiction is Judicial Code, Section 237b as amended by Act of February 13, 1925; 43 Stat. 937; Title 28 U.S.C.A., Section 344(b).

B.

The date of the judgment to be reviewed is November 18, 1940 on which date the County Court of Rockland County entered an order making the judgment of the Court of Appeals of the State of New York in this case its own judgment (R).

C.

The nature of the case and the ruling of the law were such as to bring the case within the jurisdictional provision of Section 237b (Supra) as appears from the following:

(a) The first contention of the petitioner is that the plea of guilty by the petitioner to the indictment was brought about by the deceit, fraud and trickery of the district attorney and petitioner's counsel, thereby rendering such plea involuntary and void, in that had such acts not been practised upon him, petitioner would not have been deprived of a trial on the merits. Hence, the conviction and imprisonment of the petitioner (which judgment and sentence was affirmed by the Court of last resort of this State), is void as having been rendered in contravention of the Fourteenth Amendment to the Constitution of the United States.

The specific statement of Federal Constitutional rights under this contention appears at page 34 and 35 of the record.

There was no opinion rendered by the Court of Appeals of the State of New York.

Petitioner's contention under the Federal Constitution were elaborately urged in the record and in the Appellate Courts and the point was maintained and preserved in the Court of Appeals of the State of New York, the Court of last resort.

The record and law set out show a direct Federal question presented and rejected, and the question is now one for this court.

(b) The second contention of the petitioner is that the effect of the acts of the district attorney was in effect a flagrant denial of petitioner's right to counsel, hence a deprivation of petitioner's right to life and liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

Petitioner's rights under the Federal Constitution were asserted at pages 34 and 35 of the record. (Motion by petitioner to vacate and set aside the judgment of conviction, withdraw the plea of guilty and substitute and reinstate the plea of not guilty and for a new trial.) Petitioner's affidavit on this motion stated, "I most strongly urge and appeal to this Honorable Court's inherent discretion in such a case as mine to grant me an opportunity of having my day in court so that I can vindicate myself. The constitution of this State has given me, as well as every other person, the right not to be deprived of life, liberty or property without due process of law, as well as the natural right to be allowed to appear and defend in person and with counsel as a party accused.

" I do urge that a denial of the court's discretion in favor of my application would be tantamount to an absolute flagrant abuse of my constitutional rights. I have not had the opportunity of being heard either personally or through my counsel, but on the contrary, my plea of guilty during the progress of my case was involuntary and committed unknowingly and done only because of absolute fraud and trickery

practised upon me and my counsel. This can hardly be said to be within keeping of my constitutional right to liberty.

'There has been throughout, an apparent absence of "due process of law". My only remedy to correct such grave error is the one I am now seeking.'

(c) The third contention of the petitioner is that the action of the County Court in summarily disposing of petitioner's contentions as to the circumstances under which the plea of guilty was made without affording him the right to prove them in open court, was a denial of the opportunity to be heard in contravention of the Fourteenth Amendment to the Constitution of the United States.

The petitioner made application to the County Court for an order vacating and setting aside the judgment of conviction, withdrawing the plea of guilty and reinstating the plea of not guilty and for a new trial. Request was made for an opportunity to present witnesses and to have petitioner present in open court so that a full hearing as to the issues presented by the moving papers might be had. (R page 70). This request was indirectly denied by the failure of the court to direct such a hearing.

III.

Facts

A statement of the material facts has been set out in thepetition under statement A, pp1-4, and under the appropriate points in the brief.

IV.

Summary of Argument

A complete summary of the argument is printed in the index (Supra) page

Point One

The Plea of Guilty by Petitioner was an Involuntary One, having Been Brought About by the Fraud, Deceit and Trickery of Petitioner's Counsel and The District Attorney and Depriving Petitioner of A Trial On The Merits in Contravention of The Fourteenth Amendment To The Constitution of The United States.

The statute under which the motion to withdraw the plea of guilty was made is Section 337 of the Code of Criminal Procedure which provides:

"The court may in its discretion, at any time before judgment upon a plea of guilty permit it to be withdrawn, and a plea of not guilty substituted."

The Court of Appeals of the State of New York in construing this section has in general terms interpreted it to mean that after the beginning of the term of imprisonment, the Court has no power or jurisdiction to permit the plea to be withdrawn. However, in view of the decision in the case of People vs Darboch, 265 N Y 125, it has been held that:

"In other words, after judgment and the commencement of the sentence, the plea of guilty cannot be withdrawn simply because the defendant happens to have a past record of felonies. A man may be tricked or deceived into pleading guilty. When such appears, the Courts may be able to find some remedy."

Under such statute in various jurisdictions, relief has been afforded under similar circumstances where a plea of guilty was entered under a misapprehension or mistake, or where it was induced by fraud, duress, coercion or deceit.

Griffin vs State, 12 Ga App 615
Kidd vs Commonwealth, 255 Kent. 498
People vs Schwartz, 201 Cal 309
State vs Raponi, 33 Idaho 368
State exrel Foot vs District Court, 81 Mont 495
State vs Roberts, 136 Wash 359
Mounts vs Commonwealth, 89 Kent 274

The Court held in Mounts vs Commonwealth 98 Kentucky 274:

"A plea of guilty is inevitably followed by conviction of the offense charged in the indictment; that the only question left open in such case is the nature and extent of punishment which is still within the legal discretion of the jury. Nevertheless, if the court or attorney for the commonwealth induces a defendant in a criminal prosecution to enter a plea of guilty and he is thereby over-reached or deceived, even in respect to the extent of the punishment, permission should be given to him to withdraw the plea and substitute a plea of not guilty, a new trial being granted for that purpose."

The petitioner's plea of guilty was entered only because of the action and conduct of petitioner's counsel and the district attorney. As such he was denied the right to a trial on the merits.

People vs Walker, 260 Ill 427
Griffin vs State, 12 Ga App 615

" The law is not composed of a series of snares and pitfalls for the unwary, neithrdoes it favor what Judge Bliss terms "snap judgments".

"Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty in prosecutions for felonies, to see that the prisoner has not made his plea by being misled, or misunderstanding or the like." State vs Stephens 71 Missouri 535 also State vs Kaing 71 Missouri 551.

Petitioner's plea of guilty was a nullity and void. The motion made was not merely to withdraw the plea of guilty and to reinstate the plea of not guilty; it was a motion to vacate the judgment of conviction which should have been set aside for irregularity and fraud. The conduct of the district attorney and petitioner's counsel effected a fraud on the Court.

While a State is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, in doing so, however, a State may not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder vs Massachusetts, 291 US 97, 54 Sup Ct Rep 313.

While Section 337 of the Code of Criminal Procedure regulates in general terms the procedure as to withdrawal of a guilty plea, in this instance justice has been gravely offended.

In the case of People vs Clavey 355 Illinois 358, it was said;

"The State is sovereign, and it neither needs, nor can it accept, the benefit of any questionable or undue advantage over one of its citizens. Its procedure against an accused must be kept on such an ethical plane as will be consistent with its dignity and its power. When it appears that surprise or influence has caused an accused to plead guilty when he, in fact, has any defense at all, it is a fur-

IV.

The Court of Appeals of the State of New York has decided the Federal questions herein involved in a manner directly in conflict with the decisions of the Supreme Court of the United States.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the County Court of the County of Rockland and to the Court of Appeals of the State of New York commanding the said courts to certify and to send to this Court for its review and determination on a day certain to be therein named, full and complete transcripts of the records and all proceedings in the case entitled People of the State of New York against Horace Lee Bartindale, defendant, and that the said judgment of the Court of Appeals of the State of New York and the County Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioner will ever pray.

Date:

Horace Lee Bartindale

by_____

Attorney for Petitioner

ficient reason to permit him to withdraw the plea of guilty and substitute one of not guilty."

A substantial right of the petitioner was violated; he was deprived of a trial on the merits.

In the case of State vs McAllister 96 Montana 348, the court held:

"A change of plea will ordinarily be permitted if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act, or if influenced unduly and improperly either by hope or by fear in making it, or if it appears that the plea was entered under some mistake or misapprehension..."

"When application is made to change the plea, all doubts should be resolved in favor of a trial on the merits, and the discretion of the court should be liberally exercised in favor of life and liberty..."

The law should seek no unfair advantage over an accused but, on the contrary, should be watchful to see that the proceedings in which his life or liberty is at stake are fairly and impartially conducted.

Point Two

The Effect of The Acts and Conduct of The District Attorney was a Flagrant Denial of Petitioner's Right To Counsel and Hence A Denial of His Rights Under The Fourteenth Amend ent To The Constitution of The United States.

A hearing includes the right to the aid of counsel, when desired and provided by the party asserting the right; it comprehends generally the right to be heard by counsel and entitles him to the guiding hand of counsel at every step.

Powell vs Alabama, 287 US 45, 68-69
Cooke vs United States, 267 US 517, 537
Pelts vs Murphy, 201 US 123, 129
Kelly vs Oregon, 273 US 589, 591

The right to counsel in every stage of a criminal proceeding necessarily connotes the right to appear and defend with counsel, uninfluenced by false and untrue representations.

Can it be said that the petitioner had the aid and assistance of

counsel throughout the proceedings when counsel was misled by the actions of the district attorney? That the promises and representations influenced counsel for the petitioner to such an extent that on the basis of such representations so communicated to petitioner, he changed his plea from not guilty to guilty.

The court held in the case of Johnston vs Commonwealth 276 Kentucky 615:

"Many men may have escaped punishment altogether, others may have unduly delayed its imposition. But neither of those considerations nor both of them can ever warrant the forfeiture of life or liberty of a man, however shocking his crime without a trial and conviction in conformity with the law. It is an inviolate right of free men to have the assistance of counsel when being prosecuted for the commission of a crime (citing constitution). This constitutional guaranty of the right of counsel imports the right to counsel prepared. To compel a defendant to go into trial without reasonable opportunity to prepare his defense is not technical. It goes to the very foundation of justice (Powell vs Alabama 287 US 45)."

In the case of State vs Keller 57 North Dakota 645, it was held that a defendant in a criminal cause is ordinarily bound by a course of action that is followed with respect to his defense by counsel employed by him. But where he is ignorant of his rights and unacquainted with the course of procedure in criminal trials and during the trial his counsel is so incapacitated as not to comprehend what is taking place, and the defendant's rights are not safeguarded so that in effect he is not represented by counsel at all, the rule does not apply, not having had a trial to which he was entitled under the Constitution and he is entitled to a new trial.

Also in the case of People vs Hitti 312 Illinois 73, the court held:

"It is intended that only persons qualified by learning, intelligence and good moral character shall be permitted to defend in a court of justice the life or liberty of a person charged with crime.

The fact that the accused is poorly defended will not justify the reversal of a judgment where it is reasonably supported by satisfactory evidence...but it is proper to take such facts into consideration, in a case of this character, in determining whether the accused has been legally convicted. At the time the attorney appeared for these defendants he held a license from the court which certified to the public that he was competent to properly represent any client who might employ him, and any person employing him had a right to rely upon that certificate. The fact that the defendants were ignorant, illiterate foreigners, unacquainted with court procedure in this or any other country and unable to speak and understand the English language requires that we take into consideration the gross incompetency and stupidity of counsel appearing for them."

Similarly the petitioner, never having been arrested or convicted of any crime heretofore was utterly unaccustomed to court procedure. He relied upon his counsel in every step of the proceedings. Whether in fact the district attorney made the representations and promises to counsel or counsel made them to petitioner in an effort that he change his plea, the conclusion remains that petitioner was actually misled and deceived thereby.

However guilty a defendant upon due inquiry might prove to have been, he was, until convicted, presumed to be innocent. The wrong committed by the State through its officers strikes at the foundation of the administration of the criminal law. To condone such conduct is to deprive a defendant in a criminal proceeding of the very rights which are guaranteed him under our Constitution.

Point Three

The Action of The County Court In Summarily Disposing Of Petitioner's Contentions as To The Circumstances Concerning His Plea of Guilty Without Affording Him The Right To Prove Them In Open Court Was In Effect A Denial Of The Right To Be Heard in Contravention Of The Fourteenth Amendment To The Constitution of The United States.

The question of due process "must be dealt with in a large way,

as questions of due process always are, not narrowly or pedantically in slavery to forms or phrases", Burnet vs Wells, 289 US 670,53Sup Ct Rep 761. It is easier to define what is not than what is due process of law within the meaning of the Fourteenth Amendment. In Davidson vs New Orleans, 96 US 97, this Court said that "The application of such an important phrase in the Federal Constitution" must be developed by the gradual process of judicial inclusion or exclusion, as the case presented for decision shall require, with the reasoning on which subject decisions may be founded.

This Court has long since established that one of the absolute essentials of due process of law as provided by the Fourteenth Amendment, is the right to be heard. Fundamental rights of a defendant shall not be taken away from him arbitrarily or without the right to be heard according to the usual course of law in such cases. The notice and hearing must correspond to and the relief granted must be appropriate to that which has been heard and determined on such notice.

Frank vs Mangum 277 US 309, 334
Garland vs Washington 232 US 642
Standard Oil vs Wo. (Hadley) 224 US 270, 281

Likewise to condemn without a hearing is repugnant to the due process clause in our constitution.

Riverside & Dan River Cotton
Mills vs Menefee 237 US 189, 193

Petitioner was denied the right to be heard. His application to set aside the judgment of conviction, to withdraw the plea of guilty and for a new trial was based upon the allegations in his moving affidavit. The papers in opposition to such motion in substance denied the allegations of the moving papers. Such answering affidavits created an issue - a grave issue involving the liberty of the petitioner. Every citizen is entitled, as a matter of right, to be heard on any issue, concerning and involving his personal liberty.

Counsel for petitioner requested that an opportunity be granted him to produce petitioner so that the court may hear testimony as to the grave charges in the moving application. This request was denied. The Court then proceeded to hear oral argument of the motion by both

counsel. And directly from the bench the court denied the petitioner's motion without any reflection or consideration of the merits or truth of the allegations in the application. (R p 24)

Clearly, with the issue so grave, involving petitioner's personal liberty (he having been sentenced to imprisonment for a term of from five to ten years) he was entitled to be heard; his application to move consideration . Clearly the truth of the allegations and denials should not have been determined by a casual perusal of the affidavits.

The court, in the interest of justice should have afforded petitioner an opportunity to prove what was alleged in the moving papers. What transpired was a "solemn farce". Brown vs Mississippi 297 US 278, 283, 56 Sup Ct R 461, 463.

The record demonstrates that the County Court gave no proper consideration to the motion and failed to approach the consideration of the issues raised by this motion "with an eye single to doing justice between the People of the State upon one side and the defendant at the bar on the other." People vs Shilitano 218 NY 175.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that it may review the final judgment of the Court of last resort of the State of New York, the Court of Appeals, and correct the errors therein made and protect the petitioner in his rights, privileges and immunities granted to him by the Constitution of the United States, and that to such an end a writ of certiorari shall be granted and this Court should review the decision of the said Court of Appeals of the State of New York and finally reverse it.

Respectfully submitted,

Horace L Pettibone

Petitioner In Person

Office - Supreme Court, U. S.
FILED
MAR 20 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 772.

HORACE LEE BARTINDALE,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

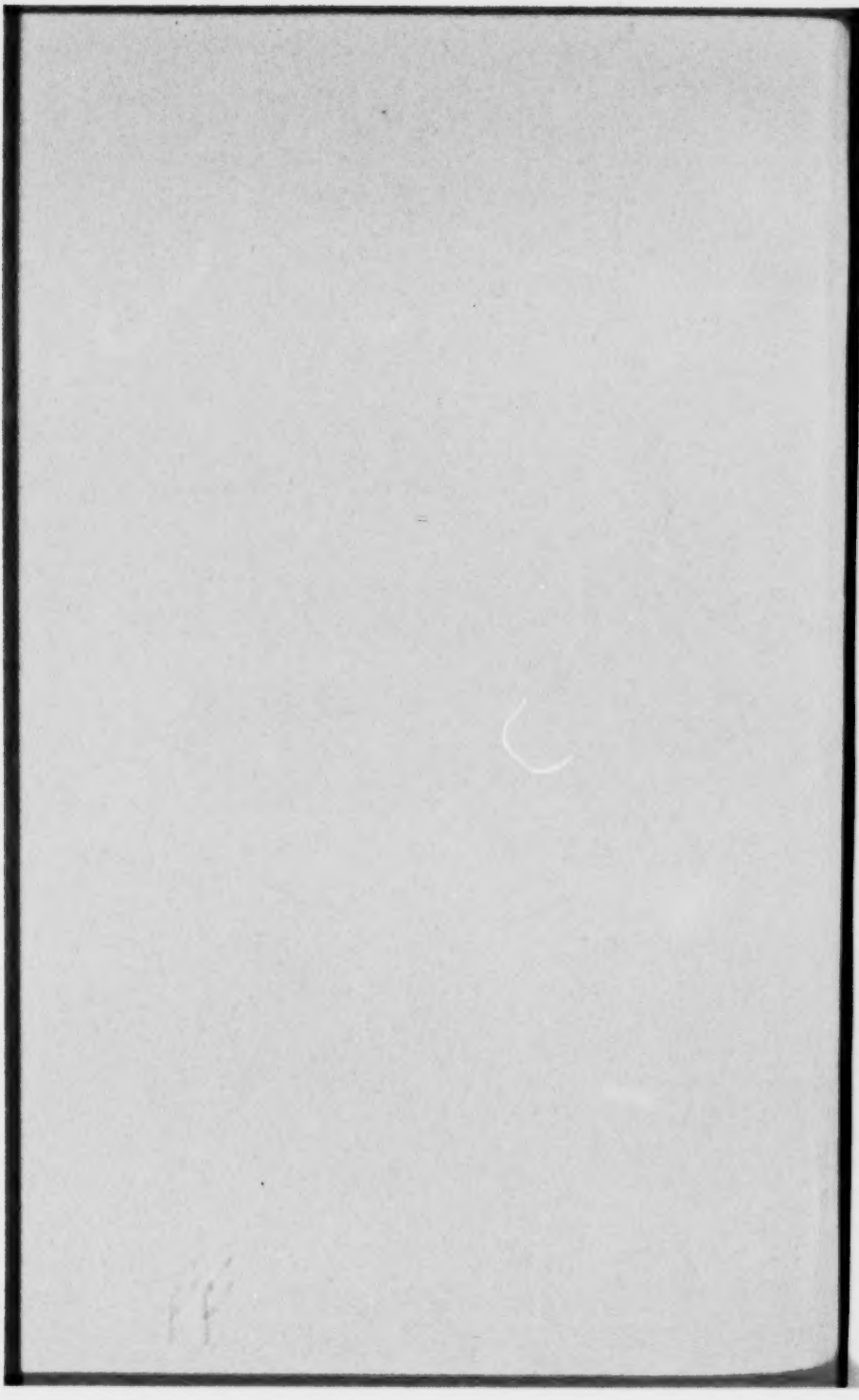
RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE V. DORSEY,
District Attorney,
Rockland County,
New City, N. Y.

Of Counsel:

HON. JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
Albany, N. Y.

THE COURT PRESS, N. Y. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 772.

HORACE LEE BARTINDALE,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This is an application by Horace Lee Bartindale for a writ of certiorari for the purpose of reviewing his conviction of the crime of sodomy on his plea of guilty, entered after the commencement of his trial on the 2nd day of October, 1939, in the County Court of Rockland County, of the State of New York, and on which plea of guilty to the crime of sodomy the petitioner was sentenced by Hon. John A. McKenna, County Judge of Rockland County, to an indeterminate term of not less than five years nor more than ten years in State's Prison; and also to review an order of the County Court of Rockland County, entered on the 15th day of January, 1940, denying the petitioner's motion for an order vacating and setting aside the judgment of conviction; permitting the

withdrawal of the plea of guilty to the indictment and substituting and reinstating a plea of not guilty; and for a new trial, both said conviction and order having been unanimously affirmed on appeal to the Appellate Division of the New York Supreme Court, Second Judicial Department, on the 15th day of April, 1940, and said judgment of conviction and order having been unanimously affirmed by the Court of Appeals of the State of New York on a further appeal, by permission, to that Court on the 13th day of November, 1940, and the remittitur to the Court of Appeals was filed in the office of the Clerk of the County of Rockland on the 18th day of November, 1940.

Facts.

Horace Lee Bartindale, the petitioner, was arrested on the late afternoon of June 5th, 1939, on a charge of having committed the crime of sodomy in violation of Section 690 of the Penal Law of the State of New York, upon the person of one John Beckvermit, Jr., at the hamlet of West Nyack, in the Town of Clarkstown, in said County of Rockland, on the afternoon of said 5th day of June, 1939, and the petitioner was arraigned on said day before Justice of the Peace Frederick R. Engels, Esq., and the hearing thereon adjourned to the 19th day of June, 1939. The petitioner was held to await the action of the Grand Jury after a hearing held before said Justice of the Peace, at which hearing the petitioner was represented by his attorneys, William Pickens, Jr., Esq. and Emanuel M. Goldstein, Esq. (R. 36, 38), both of whom participated in the cross-examination of the People's witnesses and in making the appropriate motions.

The indictment (R. 5) charging the petitioner with

the commission of the crime of sodomy was returned on the 27th day of June, 1939; and the petitioner was arraigned on said indictment in the County Court on the 10th day of July, 1939, at which time he pleaded not guilty, through his counsel, Emanuel M. Goldstein (R. 9), and he again appeared in County Court on the 14th day of July, 1939 with Mr. William Pickens, Jr. as counsel (R. 9, 10), at which time the case was adjourned to the September Term of the County Court because of the illness of the District Attorney, and the petitioner continued on bail.

The actual trial of the indictment began on the 2nd day of October, 1939, with William Pickens, Jr. acting as attorney for the petitioner, and, after a jury had been impanelled and sworn, the petitioner's attorney requested a recess (R. 11, 20), during which time counsel renewed his previous efforts to persuade the District Attorney to accept a plea of guilty to a lesser crime than that charged in the indictment (R. 37, 38). When petitioner's attorney spoke with the District Attorney in regard to the acceptance of a plea of guilty to a lesser offense, the petitioner was not present, and, at no time on that day did the District Attorney speak with the petitioner (R. 36).

On the morning of October 2nd, 1939, as the Clerk of the Court was calling the names of jurors to take their seats in the jury box, and while the District Attorney was writing the names of the jurors on a pad at the counsel table, the District Attorney was approached by Mr. Pickens, the petitioner's attorney (R. 18), and asked if the District Attorney would accept a plea of assault in the third degree, which the District Attorney declined, and Mr. Pickens again approached the District Attorney at the District Attorney's counsel table and asked the District Attor-

ney if he would accept a plea to assault in the second degree, which the District Attorney declined (R. 37-41).

After the recess above mentioned was declared, and the District Attorney was walking out of the court room, Mr. Pickens approached the District Attorney and his stenographer, Mr. John M. Goetschius, and Mr. Pickens stood to one side in the hall, and Mr. Pickens stated to the District Attorney that he did not see why the District Attorney would not accept a plea of guilty to assault since his client was a first offender, and because he felt that if the case had occurred in New York City, he doubted what action, if any, would have been taken, and that if any action were taken, it would have been handled as a disorderly conduct case with a ten dollar fine in Magistrate's Court. The District Attorney replied to Mr. Pickens that he was not interested in what went on in New York City; that this was an indictment for sodomy, and that the People were ready to proceed with the trial (R. 37, 38, 41).

The petitioner's attorney then stated that he had thought the matter over, and that, after having heard the testimony before the Justice of the Peace, he felt that the petitioner would not be acquitted, and that the best thing to do would be to plead guilty because he thought it would be better for the community if the testimony was not brought out in public, and that he intended to call that matter to the Court's attention in asking for leniency for his client, and he further stated that his client had an excellent character and record (R. 38).

There was no discussion concerning the fact that the defendant was a colored person nor that a verdict of guilty was inevitable in view of notoriety given the case (R. 38).

At the conclusion of the recess, the petitioner, through his counsel, moved to withdraw a juror and withdrew his plea of not guilty and entered a plea of guilty to the indictment, after which the petitioner's statement was taken by the Clerk (R. 21). The petitioner himself consented in open court to the action taken by his attorney (R. 12).

After one John Beekvermit, Jr., the defendant in a companion indictment charging him with the crime of sodomy committed at the same time as the offense for which the petitioner was indicted, had pleaded guilty, the petitioner and said Beekvermit were remanded to the custody of the Sheriff of the County, and the date of sentence fixed as the 9th day of October, 1939, which date was advanced to the 4th day of October, 1939 at the request of both counsel and the petitioner (R. 23).

On the 4th day of October, 1939, after the petitioner had advised the Court that he had no legal cause to show why judgment should not be pronounced against him (R. 12), and his counsel had addressed the Court in his behalf (Appendix, Respondent's Brief, p. 24), the petitioner was sentenced to the New York State Prison at Ossining, New York, as a first offender, for an indeterminate sentence of a minimum of not less than five years and a maximum of not more than ten years (R. 13), at which time Judge McKenna addressed the petitioner (Respondent's Brief, Appendix, pp. 24, 25), and the petitioner immediately entered upon the service of his term of imprisonment as imposed by the County Court.

Thereafter the petitioner retained Irving I. Erdheim, Esq., as his attorney, and through his new counsel made a motion on the 6th day of November, 1939, returnable before the County Court of Rock-

land County on the 8th day of December, 1939, for an order vacating and setting aside the judgment of conviction; permitting the withdrawal of the plea of guilty to the indictment and substituting and reinstating a plea of not guilty; and for a new trial (R. 25). Only the affidavit (R. 26-35) of the petitioner, based solely on hearsay, was submitted in support of this application, and, at no time, was there any affidavit of his former attorney, Mr. William Pickens, Jr., presented to the Court. In opposition to the petitioner's motion the People submitted the affidavits of the District Attorney (R. 36-40) and of the District Attorney's stenographer (R. 41), who was present at the time the alleged conversations with the petitioner's former attorney occurred. This motion was denied after argument (R. 14, 24), and an order to that effect duly entered in the office of the Clerk of the County of Rockland on the 15th day of January, 1940 (R. 7, 8).

Subsequently and on the 19th day of January, 1940, the petitioner made a motion in the County Court of Rockland County for a modification of the sentence imposed upon him on the 4th day of October, 1939, which motion was denied with leave to renew and without prejudice (R. 15). No appeal was taken from the order denying this motion.

A second motion was made in the petitioner's behalf for a modification of the sentence imposed upon him in the County Court of Rockland County, on the 29th day of January, 1940, which motion was denied (R. 16), and no appeal was taken from the order denying that motion.

POINT I.

No Federal constitutional question was raised in any of the courts of New York State.

The petitioner relies upon that part of his affidavit submitted in support of his motion to withdraw his plea of guilty and substitute and reinstate a plea of not guilty and for a new trial, which is contained in the record herein at folios 101-103 inclusive at pages 34 and 35, but, however, a careful examination of his affidavit will show that he was referring to the constitution of the State of New York, because he specifically refers to "the constitution of this State", meaning the Constitution of the State of New York. At no time in either the County Court of the County of Rockland nor on his appeals to the Appellate Division of the New York Supreme Court, Second Judicial Department or to the New York State Court of Appeals did the petitioner or counsel on his behalf, either by way of argument or in the briefs, raise any federal question or refer to the Constitution of the United States; and the petitioner's present contentions under the Federal Constitution were not urged until after the judgment of conviction and order of the Rockland County Court were unanimously affirmed by the Court of Appeals.

Thus an examination of the record shows that there is really no Federal question involved in this case, and the points now set forth purporting to raise questions under the Constitution of the United States are frivolous and in no aspect do they involve issues under the Federal Constitution.

Kelly v. *Oregon*, 273 U. S. 589.

POINT II.

The petitioner was not deprived of a trial on the merits in contravention of the Fourteenth Amendment to the Constitution of the United States, and his plea of guilty was not brought about by any fraud, deceit or trickery.

Not only was there no trickery or deceit practiced upon this petitioner, but there was no need of any such conduct because the prosecution had a strong case and was ready to proceed to trial. On the morning that trial began, as soon as both counsel took their seats in the court room, petitioner's trial counsel approached the District Attorney (R. 18) with an offer to plead guilty to the crime of Assault in the Third Degree, and shortly thereafter with an offer to plead guilty to the crime of Assault in the Second Degree, both of which offers were declined (R. 37). After the jury had been examined and sworn, a recess was declared at the request of the petitioner's counsel, Mr. Pickens (R. 11, 20), and Mr. Pickens again talked with the District Attorney and endeavored to obtain the prosecution's consent to the acceptance of a plea to a lesser offense. When his efforts in this regard failed, he stated that he thought that the best thing to do would be to plead guilty because, as he had been present and had heard the testimony taken before the Justice of the Peace at the time that the petitioner was held to await the action of the Grand Jury, he felt that the petitioner would not be acquitted.

If the evidence to support the indictment had been weak, or the prosecution had, for any reason, been anxious to obtain a plea of guilty, the District Attorney certainly would have accepted one of the offers

to plead guilty to Assault, particularly so when an offer was made to plead guilty to a felony, namely, Assault in the Second Degree.

Both in his affidavit submitted on the motion (R. 27) and in his brief the petitioner endeavors to create the impression that the attorney who represented him at the trial and at the time of the entry of the plea and sentence did not participate in the case until some time after he was arraigned on the indictment, when, as a matter of fact, that attorney, Mr. William Pickens, Jr., had not only represented him at the time of the indictment (R. 10) but had appeared and represented him at the hearing before the magistrate on the 19th day of June, 1939 (R. 36). On that occasion Mr. Pickens heard the testimony of the People's witnesses and read and examined the petitioner's signed statement, which was offered and received in evidence at that hearing. This statement had been taken at the time of the petitioner's arrest and contained his admission as to his participation in the offense charged.

After the petitioner on the 2nd day of October, 1939 had withdrawn his plea of not guilty and had pleaded guilty to the indictment (R. 12, 21), the Court denied the request of the petitioner's attorney that he be continued on bail pending sentence (R. 12, 22), even though he had been free on bail since shortly after he was held to await the action of the Grand Jury. As shown by the record (R. 22), the application to continue the petitioner on bail and the Court's denial thereof was as follows:

> "Mr. Pickens: If your Honor please, will your Honor continue bail of the Defendant Bartindale?
>
> The Court: I deny that motion after a plea of guilty. There is no bail to continue.

> Mr. Pickens: Even if the District Attorney consents to it?
>
> The Court: I don't care if the District Attorney consents to it or not. After a plea of guilty it is not the practice of the Court to continue defendants on bail."

The language used by the Presiding Judge in advising the petitioner's attorney that the Court did not care whether or not the District Attorney consented to his application to continue the petitioner on bail pending sentence certainly was notice to both the petitioner and his counsel that the District Attorney was in no position to and could not make any representations or promises to either or both of them as to what action the Court might take in this criminal proceeding. Surely when Judge McKenna had advised them in open court that the Court would not be influenced by any consent or recommendation of the District Attorney on the question of continuing the petitioner on bail pending his sentence, they could not believe or expect that the District Attorney could or would be able to influence the Court by recommendation or otherwise when it came to the matter of sentence.

In as much as the transcript of the proceedings at the time of the sentence on October 4, 1939 is not contained in the record submitted on this application for a Writ of Certiorari, and in as much as the Court's remarks and the remarks of the petitioner's attorney to the Court prior to sentence on that occasion refute the petitioner's present position that he was tricked or deceived, the stenographer's transcript of the proceedings immediately prior to and at the time of sentence are submitted with the respondent's brief as an Appendix.

On the 4th day of October, 1939 before actually pronouncing sentence, the Presiding Judge of the County Court addressed the petitioner (Respondent's Brief, Appendix, pp. 24-25), and both the petitioner and his attorney could readily infer and understand from Judge McKenna's remarks that he intended to impose a prison term as punishment for the offense committed by the petitioner. At that time neither the petitioner nor his attorney, either before or after the actual pronouncing of the sentence, said anything in regard to or made any complaint to the Court concerning any alleged representation or promise that the petitioner would receive a suspended sentence, but on the other hand counsel pleaded with the court to suspend the execution of the sentence about to be imposed. Certainly if such a promise or representation had been made, it would have been immediately called to the attention of Judge McKenna after a sentence of from five to ten years had been imposed.

All of the circumstances which surround the proceedings in the County Court of Rockland County on both the 2nd and 4th days of October, 1939 show clearly that no such representation or promise was made as claimed by this petitioner. It is respectfully submitted that if a defendant who feels dissatisfied with the sentence imposed on his plea of guilty, may change attorneys and then obtain a withdrawal of his plea of guilty and a new trial on his uncorroborated hearsay statements that he had been tricked and deceived by representations and promises as to the sentence to be imposed, that there would be no end to a criminal proceeding where a plea of guilty had been entered.

When the New York State Court of Appeals in the case of *People* v. *Daiboch*, 265 N. Y. 125, at page 131,

said that when it appears a man was tricked or deceived into pleading guilty, the courts may be able to find some remedy, that Court undoubtedly meant that there would have to be proof of such trickery or deceit. This petitioner bases his claim solely on his own uncorroborated hearsay statements, and it is the respondent's contention that the Court in the case of *People* v. *Daiboch*, *supra*, did not mean that any such remedy might be found in a case where the claim of trickery or deceit was based on any such hearsay statement.

An examination of the authorities from other jurisdictions, relied upon by the petitioner, show that in the Courts of those other States, before any such plea of guilty would be vacated, the petitioner would be required to submit a properly supported motion, and it would be necessary for the Court to find proper and sufficient legal proof that the plea of guilty had not been voluntarily and intelligently made or had been obtained through duress, fraud, trickery, or deceit, and there is no such legal and sufficient proof of any such fact in this case.

The petitioner further contends that even if no promises or representations were made by the District Attorney to his counsel, he should be permitted to withdraw his plea of guilty because of trickery and deceit practiced upon him by his own attorney. If a defendant after he had been sentenced on his plea of guilty may obtain a withdrawal of his plea and a new trial merely by obtaining a new attorney and then setting up the claim that he was not properly advised and was deceived by his former attorney, a situation would arise where it would be safer and to the best advantage of the community to make every defendant stand trial regardless of whether or not he desired to plead guilty to the charge in the

indictment. It would seriously interfere with the orderly procedure of our penal statutes were the courts to grant new trials on the pretext of a defendant's alleged injudicious selection of counsel or on the defendant's unsupported statement that he had been tricked or deceived by his former attorney.

The petitioner, having been, at all times, represented by counsel and in a position to call any witnesses he desired to have heard in his behalf, was not deprived of his liberty without due process of law because there is no showing that he had not full opportunity to consult with counsel, or that he was in any way prevented from securing needed witnesses, and his petition for a Writ of Certiorari is wholly without merit.

Kelly v. *Oregon*, 273 U. S. 589.

This case is clearly distinguishable from the cases of *Brown* v. *Mississippi*, 297 U. S. 278, and *Powell* v. *Alabama*, 287 U. S. 45, cited by petitioner, because in those cases the question of due process of law involved the questions of brutality and lack of counsel, neither of which situation existed herein.

POINT III.

All of the proceedings, from the time of the petitioner's arrest to the affirmance by the Court of Appeals, were in conformity with the laws and procedure adopted by the State of New York.

The petitioner was arrested on the 5th day of June, 1939, in the Town of Clarkstown, in the County of Rockland and State of New York, on a warrant charging him with the commission of the crime of

sodomy and was arraigned before a magistrate who informed him of the charge against him and of his right to the aid of counsel, and, at the petitioner's request, the proceedings were adjourned until the 19th day of June so that the petitioner might engage counsel. These proceedings were in conformity with the provisions of Section 188 of the New York Code of Criminal Procedure, which is as follows:

> "Sect. 188. *Magistrate to inform defendant of the charge, and his right to counsel.*
>
> When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

Thereafter, on the 19th day of June, 1939, the hearing was held before the magistrate, at which time the petitioner was represented by William Pickens, Jr. and Emanuel M. Goldstein, Esquires, as his attorneys and counsel. At this hearing witnesses were called and examined on behalf of the People, and these witnesses were cross examined by the attorneys for the petitioner, and a statement of the petitioner admitting his part in the commission of the sodomy was offered and received in evidence; and, after the defendant, through counsel, had waived further examination, he was held to await the action of the grand jury in conformity with the provisions of Section 208 of the New York Code of Criminal Procedure, which is as follows:

> "Sect. 208. *When and how to be committed.*
>
> If, however, it appears from the examination

that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must, in like manner, indorse on the depositions and statement, an order, signed by him, to the following effect: 'It appearing to me by the within deposition (and statement, if any) that the crime therein mentioned (or any other crime according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same.' "

Thereafter the petitioner was duly indicted and arraigned and brought on for trial in the County Court of Rockland County as heretofore mentioned.

It is to be noted that petitioner's attorney William Pickens, Jr., who represented him when he pleaded guilty to the charge, had been one of his attorneys and counsel from the time of the hearing prior to his being held to answer to the grand jury up to and including sentencing under his plea of guilty.

Following his sentence in the County Court, the petitioner was delivered to the Warden of the New York State prison designated by the Court and entered upon the execution of his sentence.

Thereafter the petitioner engaged other counsel and made a motion before the County Court under Section 337 of the Code of Criminal Procedure to vacate and set aside the judgment of conviction, and to permit the withdrawal of the plea of guilty to the indictment and substitute and reinstate a plea of not guilty, and for a new trial. This motion was made solely on the affidavit of the petitioner, and he concedes that he had no personal knowledge of the matters set forth

therein but relied upon what was told to him by his attorney William Pickens, Jr. No affidavit or proof of any kind by attorney Pickens was submitted or offered to the Court. In a motion of this kind the practice is to present the same to the Court upon affidavits and argument. The petitioner's appearance before the Court to testify would have been of no assistance to the Court in deciding the motion since the petitioner's own moving affidavit showed he had no knowledge of the allegations therein contained but was relying upon hearsay. However, if the petitioner or his then counsel had desired to have him before the Court to testify, he should have, prior thereto, obtained an order from the Court to that effect pursuant to the provisions of Section 415 of the Civil Practice Act of the State of New York, which is as follows:

> "Sect. 415. *Order to bring up prisoner as witness.*
>
> A court of record, other than a justices' court of a city, or a judge of such a court, or a justice of the supreme court has power, upon the application of a party to an action or special proceeding pending therein, to make an order for the purpose of bringing before the court, a prisoner, detained in a jail or prison within the state, to testify as a witness in the action or special proceeding, in behalf of the applicant."

But the petitioner's attorney at no time requested the Court for an opportunity to have the petitioner or any other witness in court (R. 70), but only offered to do so if the Court desired his presence (R. 70), so that it affirmatively appears from the record that the petitioner was not denied a hearing and that coun-

sel for the petitioner at no time requested an opportunity be granted him to produce the petitioner so that the Court might hear testimony, as claimed by him in his petition and brief. The motion was opposed by the respondent, and, after argument and fully hearing both sides, the motion was denied by the Court. Section 337 of the Code of Criminal Procedure of the State of New York provides as follows:

> "Sect. 337. *Plea may be withdrawn by permission of the court.*
>
> The court may in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted."

It has been repeatedly held by the Courts of New York State, in interpreting Section 337 of the Code of Criminal Procedure, that the Court was without jurisdiction to permit a defendant to withdraw his plea of guilty and substitute therefore a plea of not guilty after judgment had been pronounced on the plea of guilty and the defendant's term of imprisonment had commenced.

> *People* v. *Daibock*, 265 N. Y. 125;
> *Matter of Dood* v. *Martin*, 248 N. Y. 394;
> *People* v. *Wroldsen*, 228 N. Y. App. Div. 838;
> *People* v. *Vitale*, 211 N. Y. App. Div. 814.

The petitioner contends that this interpretation of Section 337 of the Code of Criminal Procedure is not a general one, but that where a defendant had been tricked or deceived into pleading guilty, the courts should be able to find some remedy. There was no trickery or deceit practiced on this petitioner and

the respondent submits that the petitioner's claims in that regard are entirely hearsay and, according to his own statement, he has no direct knowledge of the allegations contained in his affidavit, and he has not submitted any affidavit, or proof of any nature, of his former attorney by whom he claims these statements were made to him.

Even assuming that the County Court of Rockland County had the power or jurisdiction to grant petitioner's motion to set aside the plea of guilty and reinstate the plea of not guilty after the beginning of the term of imprisonment—although the respondent contends that the Court had no such power or jurisdiction—it would still have been a matter within the discretion of the Court according to the provisions of Section 337 of the Code of Criminal Procedure, and the Court would have been acting with proper discretion in denying the petitioner's application. As all the proceedings had taken place in the County Court, that Court's denial of the petitioner's motion would not have been an abuse of discretion particularly since the claim that the petitioner was tricked and deceived into entering a plea of guilty was based solely on the petitioner's own hearsay statements.

The petitioner then appealed both his judgment of conviction and the order denying him the right to withdraw his plea of guilty and reinstating the plea of not guilty, and these appeals were heard by the Appellate Division of the New York State Supreme Court, Second Judicial Department, and by the Court of Appeals, the court of last resort in the State of New York, and both the judgment of conviction and the order denying his request to withdraw his plea of guilty were unanimously affirmed, without opinion, in both courts.

POINT IV.

Petitioner was not deprived of life and liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

All of the proceedings in the prosecution of this criminal charge were conducted in conformity with the laws and procedure adopted by the State of New York, and it has been repeatedly held by this Court that due process of law does not require a State to adopt any particular form of procedure in criminal trials, so long as the accused had sufficient notice of the accusation and adequate opportunity to defend.

Snyder v. *Massachusetts*, 291 U. S. 97;
Frank v. *Mangum*, 237 U. S. 309;
Garland v. *Washington*, 232 U. S. 642;
Rogers v. *Peck*, 199 U. S. 425.

At the arraignment and hearing before the Magistrate before indictment and at the arraignments in the County Court after indictment, sufficient notice of the accusation was given to the petitioner. The petitioner had adequate opportunity to defend himself, both at the magistrate's court hearing at which he was represented by two attorneys, and later after indictment, because long prior to his indictment he was released from custody on bail and continued so until the day he entered his plea of guilty to the charge after the jury had been selected and sworn and the trial was ready to proceed.

As pointed out before, no request was made in behalf of the petitioner nor was any attempt made to produce him before the court upon the hearing of the motion to withdraw his plea of guilty and to

substitute a plea of not guilty; and his presence was not necessary or required. And it is a well known fact that many motions before trial and after trial are heard in the defendant's absence as are the prosecutions of appeals. There was no need for the presence of the defendant either as an aid to the court or himself because the matter concerning which he would have been called upon to testify was purely hearsay, according to his own application, and it was not an instance where he was to be or should have been confronted with witnesses against him.

Snyder v. *Massachusetts*, 291 U. S. 97, 107.

This petitioner, as a defendant on a criminal charge, received fair and impartial treatment and was prosecuted on the charge against him in conformity with the laws and regulations expressed by the sense of justice of the People of the State of New York, and in determining whether one convicted of crime has been denied due process of law guaranteed to him by the Fourteenth Amendment of the United States Constitution, the entire course of proceedings and not merely a single step must be considered.

Frank v. *Mangum*, 237 U. S. 309, 331.

Merely because the procedure adopted by the State of New York for the prosecution of a criminal charge of this nature, and which procedure, together with all the rights and privileges guaranteed to him, was followed in the prosecution of the original charge and the subsequent indictment against the defendant, does not meet with the petitioner's approval, and he may differ as to the fairness or policy of the People

of the State, is not a valid reason for changing or nullifying the established practice and procedure of the State. If that were so then the criminal law would be brought into contempt and every expression by the defendant that he believed that he had been unjustly dealt with would be sufficient to nullify a sentence pronounced by a court of competent jurisdiction in obedience with the court's own State law and thereby set the guilty free.

CONCLUSION.

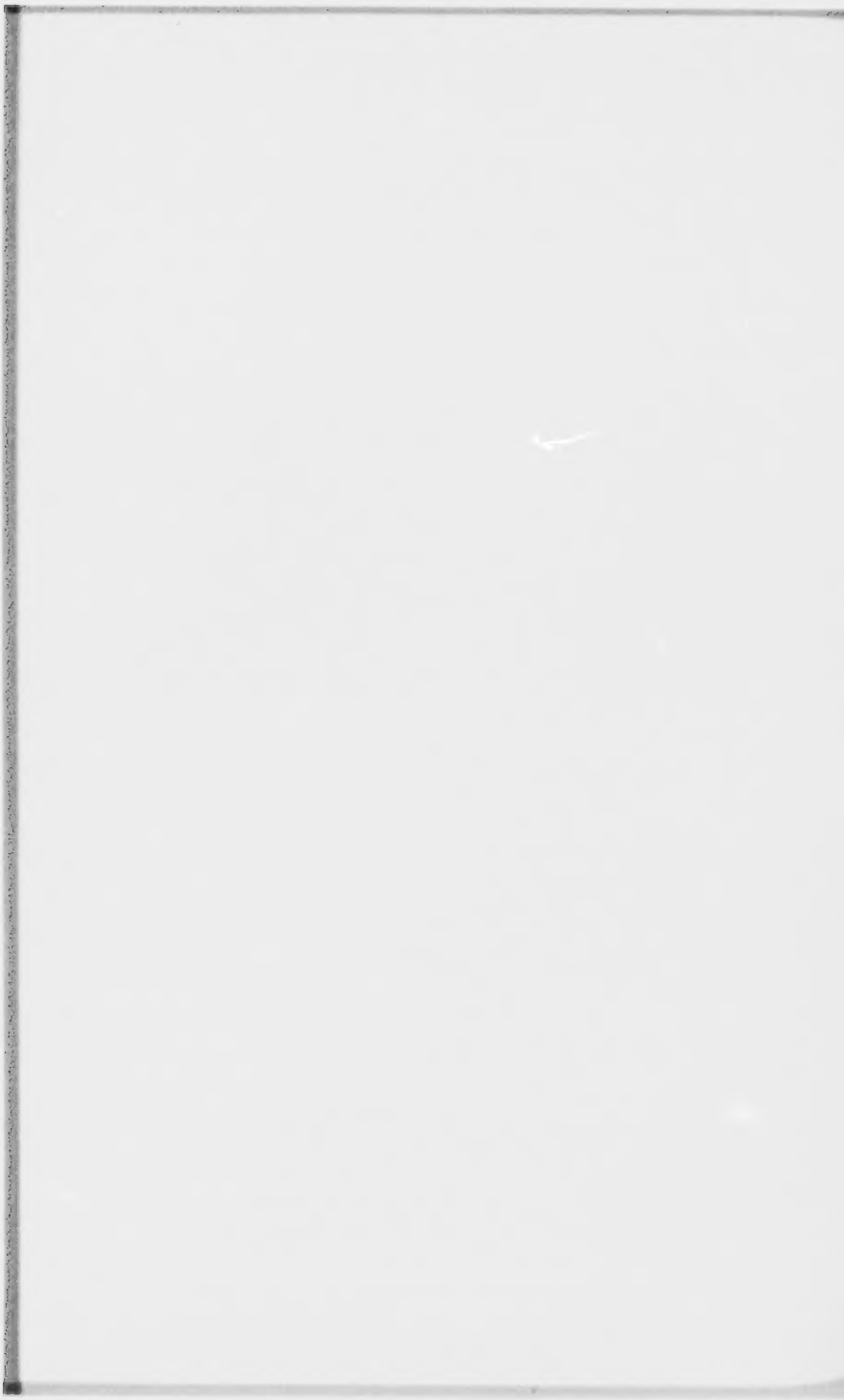
The application of the petitioner for a writ of certiorari for a review of the final judgment of the Court of Appeals of the State of New York, which affirmed the judgment of conviction and order of the County Court of the County of Rockland, should be denied.

Respectfully submitted,

GEORGE V. DORSEY,
District Attorney,
Rockland County,
New City, N. Y.

Of Counsel:

HON. JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
Albany, N. Y.



APPENDIX.

COUNTY COURT,

COUNTY OF ROCKLAND.

THE PEOPLE OF THE STATE OF NEW YORK

vs.

HORACE LEE BARTINDALE,

Defendant.

Courthouse, New City, N. Y.
Wednesday, October 4th, 1939.

Before—HON. JOHN A. McKENNA,
County Judge of Rockland County.

HON. GEORGE V. DORSEY,
District Attorney,
For the People,
New City, N. Y.

WILLIAM PICKENS, ESQ.,
Attorney for the Defendant.

The Clerk: The People of the State of New York against Horace Lee Bartindale, Defendant.

Mr. Pickens: For the Defendant. (The Defendant was present in Court.)

The Clerk: Mr. Bartindale, have you any legal cause to show why the judgment of this Court should not be pronounced against you?

The Defendant: No.

The Court: Now, has counsel anything to say in mitigation of the sentence the Court is about to pronounce?

Mr. Pickens: If your Honor please, I simply direct your Honor's attention, first of all to the heretofore clean record of this Defendant which, I think, should be taken into consideration and I think your Honor should give it weight in passing judgment.

Secondly, I wish to reiterate what I felt to be the motivating cause of taking the plea and that is the unpleasant factors in this case and I felt in giving my advice to this Defendant, and when I pointed them out to him he could see the advantage and the necessity, from the point of view of the public here in Rockland County if those facts were released to the press. That was one of the motivating basis of my advice to this Defendant.

I feel that the State and the People will be protected to the granting of this Defendant, if your Honor sees fit to do so, the suspension of the execution of this sentence because then the People will have the advantage of holding the execution of this sentence over his head and I think that the deterrent value of such judgment on the part of this Court would have the effect of double security to the people of Rockland County, the people of this community against a similar occurrence of this nature. In other words, I feel that this Defendant, in view of the fact that should he go wrong again, realizes that not only will he have to pay for that second mis-step, but he will also have to pay for the first mis-step, if your Honor please.

That's all I have to say and I turn the Defendant over to your mercy.

The Court: Horace Lee Bartindale, you have been convicted, by your plea of guilty, of one of the most heinous and degrading crimes known to our Penal Law. I quite concur in what your counsel has said with respect to the indecency in the exposure or in avoiding the necessity of exposure of the sordid details of a crime of this nature, but I cannot agree with him that the society of Rockland County of the State of

New York would be safe from the practices of a man that indulges in this type of crime.

Too often has it left in its wake the waning body or the destroyed life of some human being because as the disease progresses the victim is too often some little child or some man or woman in the walks of life.

I have given your case, as I do every case, the benefit of my own personal investigation. I have consulted various people in this County concerning you and this is not the first time that you have practiced this sordid and most heinous crime. You have been practicing this crime for four, five or six years and if it wasn't for the victim of this last assault you would still be practicing this crime.

Now, I don't want you to feel that because of your color or your religion or anything else—that doesn't mean anything by way of prejudice in the mind of the Court. I would have the same to say if your color was different; if you were a white man I would have the same to say to anyone that practices such a low and reprehensible crime and I don't feel society is safe with such a man at large.

Now, in accepting your plea of guilty I have taken into consideration the saving to the taxpayers of this County by not going through with a trial and the embarrassment attendant to the jury and the public as well in the publicity of such a crime, and the sentence of the Court is that you be sentenced to the New York State Prison at Ossining, New York as a first offender for an indeterminate sentence, the minimum of which shall not be less than five years and the maximum not more than ten years. Now see if you can adjust yourself and reform yourself.

State of New York,
Rockland County Clerk's Office—ss.:

I, HEMAN M. PURDY, Clerk of said County, hereby certify that I have compared the foregoing copy of *Transcript of Stenographer's Minutes, The People of the State of New York* vs. *Horace Lee Bartindale* with the original now *filed Apr. 4, 1940* in said office, and find the same to be a true and correct transcript therefrom and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said County this 4th day of Oct., 1940.

HEMAN M. PURDY,
Clerk.